IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPLICATION NO.5174 OF 2004
IN
CRIMINAL APPEAL NO.908 OF 2004

Mashak Bakshubhai Pathan ..Applicant
(Org.accd.No.5)

Vs.

The State of Maharashtra ..Respondent

Mr.P.R. Arjunwadkar for the applicant.
Mr.D.S. Mhaispurkar, APP for State.

**CORAM: S.S. PARKAR & R.S. MOHITE, JJ.**

**Date : January 19, 2005.**

**P.C.:**

1. Heard. This is second application made on behalf of this applicant who is original accused no.5. The earlier application made by some of the accused in this appeal was decided on 16/8/2004 by us when the application on behalf of this applicant was rejected by observing in paragraph 5 of the said order as follows:-

> "5. So far the other application made on behalf of original accused No.3,5 and 6 is concerned, there is evidence of the witnesses against accused No.3 and 5 about their presence and/or participation in the assault on the deceased and there is also recovery of blood stained weapons at their instances, though belatedly and, therefore, their case for bail cannot be considered in a matter of this kind."

2. The learned advocate for the applicant points out that there is no positive evidence against this applicant for having assaulted the deceased. One of the injured witnesses Ambaji Gaddi has attributed assault to this applicant on him with a sword. As per the medical certificate he received simple injury by blunt weapon. There are four eye witnesses to the incident, two of whom, according to the learned APP, had made improvements in their evidence while implicating this applicant for having assaulted the deceased. Mr. Arjunwadkar points out that PW 1 in his deposition has implicated accused no.3 Imtiyaj and juvenile accused Rehman for having assaulted the deceased with swords. He has not named this applicant specifically for having assaulted the deceased with any weapon. One of the witnesses has stated that this applicant was carrying weapon like satoor and not sword. As per the medical certificate of Gaddi the applicant appears to have used blunt weapon.

3. The prosecution is relying on the oral dying declaration allegedly made by the deceased to two prosecution witnesses, in which he has implicated this applicant also. That ultimately will be a matter of

appreciation of evidence as to how far that oral dying declaration can be relied on or can be said to have been proved. The deceased had received stab injury in his stomach which is attributed to accused no.3 Imtiyaj and the juvenile accused Rehman. The trial court has also referred to the assault attributed to accused no.3 Imtiyaj and absconding accused in the F.I.R. In view of the aforesaid evidence and the discrepancy about the weapon used by the applicant but without going into the minute details at this stage, it would not be inexpedient to release this applicant on bail on condition when he is in custody from 9/11/2002 i.e. for a period of more than two years now.

4. In the result, this application is allowed and the applicant is directed to be released on bail in the sum of Rs.30,000/- with one or two sureties to make up the amount on condition that he shall report to the concerned police station once in a month.

**(S.S. Parkar, J.)**

**(R.S. Mohite, J.)**